Supreme Court, U.S.
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No. 99-1908

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ALABAMA DEPT. OF PUBLIC SAFETY AND ALABAMA DEPT. OF PUBLIC SAFETY,
Petitioners

v.

MARTHA SANDOVAL,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ENGLISH LANGUAGE ADVOCATES AND ENGLISH FIRST FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE STATE OF ALABAMA

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QUESTIONS PRESENTED

Whether Congress intended to create a private cause of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

Note: *Amici curiae* respectfully suggest that the Question presented above fairly includes the following questions:

Whether Title VI of the Civil Rights Act of 1964 requires a state agency, which receives federal funds for some of its programs, to provide all services in any language demanded by applicants.

Whether a person's choice of language can be equated, under Title VI of the Civil Rights Act of 1964, to the person's national origin.

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INTEREST OF AMICI CURIAE

There are two amici curiae participating in this brief.[1] Counsel for all parties have consented to the filing of this brief.

English Language Advocates ("ELA") is a non-profit advocacy organization dedicated to the preservation and promotion of a common language – English – in American political and governmental life. ELA is an unincorporated project of U.S., Inc., of Petoskey, Michigan, a non-profit charitable and educational corporation. ELA and its President, Robert D. Park, have been the principal advocates for "official English" policies before the federal courts, including in *Arizonans for Official English and Robert D. Park v. Arizona*, Nos. 95-974 (*"AOE I"*) and 98-167 (*"AOE II"*).

English First Foundation ("EFF") is a national, non-profit charitable organization which studies the significance of the use of English in the United States and educates the public about the importance of preserving English as the common language of the United States. EFF conducts research, educational programs, seminars and conferences, and provides legal counseling and assistance. EFF was an *amicus curiae* in Nos. 98-404 and 98-564, *U.S. Dept. of Commerce v. U.S. House of Representatives,* and *Clinton v. Glavin*.

Amici ELA and EFF are deeply concerned about the effect of the Eleventh Circuit's equating language and

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[1]Pursuant to Rule 37.6, *amici* certify that no other person or entity made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

national origin. *Amici* are involved in efforts to promote the use of English as the language of government, and *amici* believe that equating language and national origin will both stop governments from requiring the use of English and force governments to provide services in languages other than English. Such an equation of language and national origin could have a substantial impact on *amici*'s activities.

SUMMARY OF ARGUMENT

In addition to the federalism questions raised in the Petition, the lower court decision raises many significant conflicts with decisions regarding governmental language choices. The lower court decision conflicts with numerous opinions of this Court and other circuit courts on four important topics:

Whether language can be equated to national origin. This Court has never held that language can be equated to national origin, yet the decision below adopted just that equation. The result is that the decision below conflicts with a substantial number of cases from other circuits which have found no such equation. Similarly, the lower court confused "national origin" with "foreign descent," in part because it ignored this Court's careful and limited description in *Espinoza v. Farah Mfg Co.*, 414 U.S. 86 (1973).

Whether government agencies must provide services in languages other than English. The court below unambiguously forced a State to provide services in languages other than English. This puts the lower court in direct conflict with at least four other circuits which have found no generalized requirement in Title

VI for examinations, services or notices to be in languages other than English.

Whether Title VII of the Civil Rights Act similarly equates language and national origin. The lower court mischaracterized employment-related discrimination law cases to equate language and national origin for Title VII purposes, giving undue credit to "guidelines" of the Equal Employment Opportunity Commission. This puts the lower court in direct conflict with at least four other circuits, which have found the EEOC "language-on-the-job" rules to be *ultra vires*, *Garcia v. Spun-Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994), or have found no such equation in Title VII.

Whether States can choose to use English. Similarly, the decision below conflicts with decisions of this Court protecting core rights of States to choose the English language for internal operations. In part this is a First Amendment issue, since the States are the "speakers," but the decision below also conflicts with this Court's decisions which recognize State sovereignty in matters of internal processes. Choice of language is a historically-based core power, stemming from the Founders' time and recognized by this Court over a hundred years ago. The lower court's rejection of those core rights rests on a limited education-related decision, not on a clear, remedial abrogation of these core rights in other contexts.

Finally, this issue is an important one, which is appearing with increasing frequency before the courts. Letting the lower court decision stand will endanger hundreds of State and local government policies which require the use of English or which in some way affect

those whose first language may not be English. If every government rule is to be tested against a standard of whether any person may demand government speak in a tongue other than English, then all government policies are at risk if they have any effect on those who are not entirely fluent in English. The costs of compliance alone would be enormous, and other circuits have not been willing to impose those costs on unwilling States. In light of this Court's Title VI jurisprudence, this cannot be the correct message to send to the lower courts.

This Court should issue the writ.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Those of Other Circuit Courts:

A) The Decision Below Conflicts with Other Courts Which Have Held that Language Cannot Be Equated With National Origin:

The lower court decision equated language and national origin. *Sandoval v. Hagan*, 197 F.3d 484, 508-09 (11th Cir. 1999). This equation was the issue briefed in *Hernandez v. New York*, No. 89-7645, but not addressed in the opinion in that case. 500 U.S. 352, 360 (1991)("Petitioner argues that Spanish-language ability bears a close relation to ethnicity, and that, as a result, it violates the Equal Protection Clause. . . We need not address that argument here."). The Court should now address this question directly to guide the lower courts

on the proper way to address these increasingly-frequent cases.

Numerous circuits have faced the question of whether to equate choice of language and national origin. The decision below is the first to equate language and national origin.[2] In doing so, the lower court ignored this Court's careful and limited reading of the phrase "national origin" in *Espinoza v. Farah Mfg. Co.* 414 U.S. 86 (1973).[3]

For example, the decision below explicitly equated language and national origin under Title VII of the Civil Rights Act. 197 F.3d at 510-11. In contrast, the Fifth Circuit held that "the EEO Act does not support

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[2]Ninth Circuit Judge Stephen Reinhardt came close to this equation in an opinion vacated by this Court, and cited in the decision below. 197 F.3d at 509 n. 26, (the "Supreme Court never has held that language may serve as a proxy for national origin for equal protection analysis")but *citing Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995), *vacated* 520 U.S. 43 (1997). *Compare* cases collected in *Kania v. Archdiocese of Philadelphia*, 14 F.Supp. 2d 730, 733 (E.D. Penn. 1998)("all of these courts have agreed that – particularly as applied to multi-lingual employees – an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII.").

[3]*Espinoza* appears only as part of a string cite in a footnote. 197 F.3d at 509 n. 26. Perhaps in consequence of failing to delineate the actual definition of "national origin," the lower court's opinion confuses "national origin" and "foreign descent." *See, e.g., id.* ("The Supreme Court has never held that language may serve as a proxy for national origin for equal protection analysis.") and 197 F.3d at 509 ("whether the English-only driver's license policy acted as a proxy for targeting residents of foreign descent. . .").

an interpretation that equates the language an employee prefers to use with his national origin." *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. den.*, 449 U.S. 113 (1981). Similarly, the Second Circuit has said "Language, by itself, does not identify members of a suspect class." *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. den.* 466 U.S. 929 (1984).

The decision below compounded this conflict by dismissing other conflicting rulings on the grounds that they involved "bilingual plaintiffs" who did not suffer an adverse impact from a rule requiring English useage. 197 F.3d at 499 ("While both courts rejected these claims, their decisions rested on the *bilingual* status of the plaintiffs." (emphasis in original)). Leaving aside the fact that the characterization was wrong, the decision below conflicts with other circuits' rulings in cases where the plaintiff could not speak English at all. *See, e.g., Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686, 687 (5th Cir. 1981)(rejecting section 1981 claim by monolingual Spanish-speaking truck driver).

B) The Decision Below Conflicts With Other Courts' In Requiring Government Agencies to Provide Services in Languages Other Than English:

Similarly, the decision below explicitly required a government agency which receives federal funds to provide services in languages other than English. 197 F.3d at 497 & n. 9. The lower court decision is already the basis for other suits designed to force government

agencies to provide services in languages other than English.[4]

In contrast, the Second, Sixth, Seventh and Ninth Circuits have found no requirement for examinations, services or notices to be in languages other than English. *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994)(rejecting request for multilingual forfeiture notices); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975)(upholding English-language civil service examination, "In conducting the examination in English, the Commission violated no constitutional or civil right of Frontera"); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999)("It has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker"); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973)(rejecting a claim for Spanish-speaking interpreters and permitting English language benefit termination notices).

C) The Decision Below Conflicts With Other Courts' Employment-Related (Title VII) Cases.

In addition, the decision below rested heavily on Title VII cases, asserting that employment-related cases had demonstrated some equation of language and

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[4] *See, e.g.*, Pulaski, "Latino Sues State for Discrimination," *The Oregonian*, June 10, 2000, www.oregonlive .com/news/oregonian/index.ssf?/news/oregonian/00/06/lc_71suit10. frame (suit to force Oregon Employment Department to use Spanish).

national origin for non-English-speaking applicants for government services (as opposed to bilingual employees). 197 F.3d at 509-10 & n. 27.

In fact, however, no circuit court has ever found such an equation in Title VII.[5] *See, e.g., Garcia v. Spun-Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. den.* 512 U.S. 1228 (1994)(EEOC Guidelines equating language and national origin were *ultra vires*); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(upholding English-on-the-job rule for non-English-speaking truck drivers); *Garcia v. Rush-Presbyterian St. Luke's Medical Center*, 660 F.2d 1217, 1222 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); *Long v. First Union Corp.*, 894 F.Supp. 933, 941 (E.D. Virginia, 1995 ("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job."), *affirmed*, 86 F.3d 1151 (4th Cir. 1996).

Leaving the lower court decision intact would mean that an applicant for government services could demand services in languages other than English in

[5]Judge Stephen Reinhardt of the Ninth Circuit has repeatedly pressed for such a rule, as in *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989). In *Gutierrez*, court employees racially insulted co-workers in a language they could not understand; Judge Reinhardt upheld a Title VII claim by those hurling the insults, suggesting that the employer's remedy was to fire African-American supervisors and hire Spanish-speakers. 838 F.2d at 1043. Several Ninth Circuit judges decried this opinion as a "let them eat cake" approach which would exacerbate workplace tensions. 861 F.2d 1187, 1194 (9th Cir. 1988). This Court vacated the *Gutierrez* opinion. 490 U.S. 1016 (1989).

Alabama, but not in Illinois, where *Nazarova* says clearly that hearing notices could "be given solely in English to a non-English speaker." 171 F.3d at 483.

And the lower court's decision would mean that an applicant could use her employment-related needs to demand government employment examinations in languages other than English in the Eleventh Circuit, but not in the Sixth, where *Frontera* says that employment exams may be given in English. 522 F.2d 1215.

This Court should grant the petition to avoid these situations where the outcome depends solely on where a case is brought.

II. The Decision Below Conflicts With Decisions of This Court Protecting Core Rights of the States to Choose English for Internal Operations.

The decision below will require the State to speak in a language which its political processes have decided will harm its interests.[6] This decision conflicts with this Court's historic recognition of States' rights to "regulate the content of what is or is not expressed when it is the speaker." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995). Though *Rosenberger* is a First Amendment case, it reflects this Court's concern for States' sovereignty.

A State defines itself as a sovereign "[t]hrough the structure of its government and the character of

[6]89% of Alabama's voters approved the State's English Language Amendment in 1990. Secretary of State, *Certification of Results of Election Held June 5, 1990*, June 20, 1990, 1.

those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Several of these areas of State sovereignty lie beyond the general reach of federal laws, including the regulation of a State's internal operations. "A State is entitled to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2264 (1999)("Such plenary federal control of state government processes denigrates the separate sovereignty of the States.").

This is not a new thought, as this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970)(Black, J., joined by the Chief Justice and three other Justices)("And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

Under this Court's recent decisions, the Tenth Amendment protects the reservation of "original powers" of a State. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 801 (1995); *Alden*, 119 S.Ct. at 2259, *quoting*, *Nevada v. Hall*, 440 U.S. 410, 425 (1979).

A State's Tenth Amendment right to choose the language of its own internal operations is one of those historically-based core powers. Throughout American history, this Court has permitted States to use English. *Patterson v. De La Ronde*, 8 Wall. 292, 299-300 (1869)(Court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable requirements for all schools, including a

requirement that they shall give instructions in English, is not questioned."). And prior to the Constitutional Convention, the primacy of English was well-established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence, 1763-1815*, 18 (1972).

Like the choice of location of its own State Capitol, a State's choice to use English in conducting its affairs is a "function essential to [the State's] separate and independent existence." *Coyle v. Wyoming*, 221 U.S. 559, 595 (1911). Choice of the English language for internal State operations is thus an "original power," core State function over which federal abrogation power is limited. Any federal abrogation, therefore, must be explicit and remedial. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, __ U.S. __, 119 S.Ct. 1354 (1999). There are few, if any, such abrogations, and those identified in the decision below are neither clear nor remedial.

The lower court seemed to rest its entire view of federal regulatory power over States' internal language choices on this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974)(school district must provide some assistance to students who could not otherwise obtain an education). *See, e.g.*, 197 F.3d at 495-97, 504-07. Yet *Lau* was a narrow decision, focused specifically on a particular problem in education, and not the type of clear, remedial abrogation envisioned by this Court's recent decisions. If left intact, the decision below will encourage other courts to use *Lau* to overrule States' internal decisions in other non-educational contexts,

shoving that narrow, education-based decision far beyond its original limits.

This Court should grant the petition to protect these core States' rights.

III. This Court Should Resolve This Important Issue.

The equation of language and national origin is a constantly-recurring subject in the lower courts across the country. In the last two years alone, in addition to this case, cases involving claims for special language-related privileges have been decided in Texas, Kansas, Pennsylvania, Florida and Illinois.[7]

All but one of these cases have upheld the right to use English. The lower court decision, on the other hand, would inevitably lead to challenges to all English-related rules. The imposition of blanket policies

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[7]*Magana v. Tarrant/Dallas Printing, Inc.*, 1998 WL 548686, *5 (unreported)(N.D. Texas, 1998)("English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII"); *Tran v. Standard Motor Products, Inc.*, 10 F.Supp.2d 1199, 1210 (D.Kansas, 1998)("the purported English-only policy does not constitute a hostile work environment"); *Kania, supra*, 14 F.Supp. 2d at 733; *EEOC v. Synchro-Start Products*, 29 F.Supp.2d 911 (N.D.Illinois, 1999)("crediting" the EEOC Title VII English-on-the-job guidelines); *Webb v. R&B Holding Co., Inc.*, 992 F.Supp. 1382, 1389 (S.D. Fla 1998) ("While this Court sincerely hopes that all employees of all cultures will choose to exercise common respect and courtesy, it cannot allow Title VII to be used as a sword by which one culture may achieve supremacy in the workplace over another."); *Gotfryd v. Book Covers, Inc.*, 1999 WL 20925 (N.D. Illinois, Jan 7, 1999) (English-on-the-job rule does not constitute a hostile workplace).

requiring use of languages other than English would be burdensome. As the Seventh Circuit noted in *Nazarova*,

> "the logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first."

171 F.3d at 483.[8]

The Second Circuit noted similar concerns in *Toure*, 24 F.3d at 446 (providing forfeiture notices in preferred language would "impose a patently unreasonable burden"), as have other courts in other contexts. *See, e.g., Carmona v. Sheffield*, 475 F.2d at 739 ("we believe that the additional burdens imposed on California's finite resources and California's interest in having to deal in only one language with all its citizens support the conclusion of reasonableness."); *Vialez v. New York City Housing Auth.*, 783 F.Supp. 109, 120-24 (S.D.N.Y. 1991)(requiring hearing notices in languages other than English "insurmountable and unjustified burden on the Housing Authority").

Since the potential burden on governments and individuals from this type of language mandate is so

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[8]Such language rules sometimes confound state judges. *See, e.g., Ayers v. Landow*, 666 A.2d 51, 56 n. 9 (D.C. 1995)("It has been held, for example, that a notice to quit is defective for purposes of a residential lease if it is not written in Spanish, even if the tenant speaks only English (or, for that matter, Slovak, Swedish or Swahili)." (Citations omitted.)

great, the Court should review the decision below and determine if federal law actually requires the use of languages other than English upon demand.

CONCLUSION

Amici therefore respectfully urge the Court to issue the writ and review this case.

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